

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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MAY 17 2004

Federal Communication Commission
Bureau / Office

In re the Matter of)

Amendment of Section 73.202(b))

Table of Allotments,)

FM Broadcast Station)

Pima, Arizona (Channel 296A))

MB Docket No. 04-82

RM - 10877

RECEIVED

To: Chief, Audio Division, Media Bureau

MAY 18 2004

COMMENTSFederal Communications Commission
Office of the Secretary

R. A. Montierth, by his counsel, hereby comments on the Notice of Proposed Rulemaking proposing to modify the Table of Allotments for FM Broadcast Stations¹ to reserve FM channel 296A for noncommercial use at Pima, Arizona.² The NPRM was issued in response to a Petition for Rulemaking filed November 20, 2003 by Calvary Chapel of Tucson (hereinafter "PFR") pursuant to an FCC Public Notice inviting petitions to reserve channels in the non-reserved band (*i.e.*, FM channels 221-300) for exclusive use by noncommercial stations.³

Montierth opposes the proposed reservation, which does not comply with the relevant Commission requirements and does not adequately serve the public interest. The Commission should therefore not reserve FM channel 296A for noncommercial use at Pima, Arizona.

¹ 47 C.F.R. § 73.202(b).

² *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Station, Pima, Arizona (Channel 296A)*, Notice of Proposed Rulemaking, MB Docket No. 04-82, RM-10877, DA 04-780, (rel. Mar. 26, 2004) ("NPRM").

³ *Media Bureau Opens Window to Permit Noncommercial Educational Reservation Showings for Certain Vacant Allotments*, Public Notice, DA 03-2990 (rel. Sept. 30, 2003).

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Background

Mr. Montierth was the proponent of the rulemaking that ultimately led the Commission in 1998 to allocate channel 296A to Pima as a first local aural transmission service.⁴ In that proceeding, Mr. Montierth stated his intent to apply for the channel if it were allotted. He also stated that, if granted a permit, he would promptly construct a station on the channel. Accordingly, Mr. Montierth opposes efforts by Calvary to reserve the channel for NCE use.

The Commission has established revised criteria that must be satisfied in order for a rulemaking proponent to succeed in reserving an FM allotment for NCE use.⁵ In particular, an allotment proponent must “demonstrate that it is technically precluded from using a reserved channel (Channels 200 through 220)”⁶ (hereinafter the “preclusion criterion”). An allotment proponent must also show that “the proposal would provide a first and/or second NCE radio service to at least 10 percent of the population within the 1 mV/m contour of the proposed station”⁷ (hereinafter the “first and/or second NCE radio service criterion”). In the *NPRM*, the Commission stated that opponents to a proposed reservation could submit rebuttal comments “demonstrating that the reservation proposal would not, in fact, provide a first and/or second NCE radio service to ten percent of the population within the 1 mV/m contour of the proposed

⁴ *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Pima, Arizona)*, Report and Order, MM Docket 97-228, RM-9163, DA 98-933(rel. May 22, 1998).

⁵ *See generally Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, MM Docket No. 95-31, *Second Report and Order*, FCC 03-44, 18 FCC Rcd. 6691 (rel. Apr. 10, 2003) (“*Second Report and Order*”) at ¶¶ 34-35.

⁶ *NPRM* ¶ 2 (citing *Second Report and Order*).

⁷ *Id.* (citing *Second Report and Order*).

station.”⁸ Further, the *NPRM* asked for “comments identifying a site at which a reserved channel could be assigned with facilities fully equivalent to the proposed reserved allotment,” noting that such an alternate reserved channel proposal “must satisfy the first and/or second NCE radio service criterion.”⁹

As shown below and in the attached Engineering Statement of Mark Peabody of Cavell, Mertz, and Davis, Inc. (the “Engineering Statement”), Calvary’s proposal falls short of satisfying the relevant Commission requirements. First, the proposal fails because it ignores the existence of two NCE AM stations that serve the area. Therefore, the requirement to provide first or second NCE service is not met. Alternatively, if Calvary was justified in not counting the NCE service by AM stations in its analysis, its proposal still fails because a site exists at which a reserved channel could be assigned with facilities fully equivalent to the proposed reserved allotment, and this alternate site would satisfy the first and/or second NCE radio service criterion. Accordingly, regardless of whether AM stations are counted as providing NCE service for purposes of this analysis, Calvary’s proposal fails to comply with the relevant FCC requirements. In light of this fact, and because the proposal does not adequately serve the public interest, the Commission should retain Channel 296A for commercial use at Pima.

Calvary’s Proposal Does Not Provide First or Second NCE Aural Service as Required by the Commission’s Standard

Calvary claims that more than 99.9 percent of the total population within the proposed station’s service area would receive a new first or second NCE service.¹⁰ Calvary, however,

⁸ *Id.* ¶ 3.

⁹ *Id.*

¹⁰ PFR at 2-3.

ignores the existence of two NCE AM stations in the area. As shown in the Engineering Statement, the entire service area of the proposed channel 296A facility already receives NCE aural service from NCE AM station KFLT, licensed to Family Life Broadcasting System, Inc. in Tucson.¹¹ Thus, *no area* would receive a new first NCE aural service from a Class A NCE facility on channel 296A at Pima.¹² In addition, NCE AM station KUAZ in Tucson, licensed to the University of Arizona, provides service to *more than* 90 percent of the population in the proposed service area.¹³ Therefore, less than 10 percent of the population would receive a second NCE aural service.¹⁴ Because these figures do not satisfy the 10 percent threshold test presented in the *Second Report and Order*,¹⁵ Calvary has failed to satisfy the first and/or second NCE radio service criterion.

Calvary Has Not Demonstrated It Is Technically Precluded From Constructing and Operating an Appropriate NCE Reserved Band Facility to Serve Pima

Calvary may have ignored the NCE service of AM stations in the proposed service area because it considers such NCE service to be discretionary, in contrast to NCE service by stations in the FM reserved band, which is mandatory. Montierth has determined, however, that even if Calvary's proposal were found to meet the first and/or second NCE radio service criterion, it still fails to justify reservation of a channel in the non-reserved band because at least one reserved band channel is available that could be assigned with facilities fully equivalent to the proposed

¹¹ Engineering Statement at 2, Figure 1.

¹² *Id.* at 2, Figure 1.

¹³ *Id.* at 2.

¹⁴ *Id.*

¹⁵ *Id.*

reserved allotment and in satisfaction of the first and/or second NCE radio service criterion. Accordingly, Calvary has failed to meet the preclusion criterion and its proposal does not meet the requirements for reservation of FM channel 296A for noncommercial use at Pima.

Calvary states in its Petition for Rulemaking that it has “demonstrate[d] ‘to a reasonable degree of certitude,’ the technical preclusion of a compliant, NCE reserved band Class A facility, at minimum height above average terrain . . . and with minimum effective radiated power . . . , in the proposed station’s service area” and “establishe[d] the presumption that such an NCE reserved band facility for Pima, Arizona would be technically precluded.”¹⁶ Calvary’s showing includes the required channel studies performed at the prescribed five locations – the reference point, as well as locations at the four compass points distanced one kilometer short of the 60 dBu contour of the proposed facility.¹⁷ The channel studies consider each channel in the reserved band and identify the preclusive channel assignment or allotment that allegedly bars use of the channel by Calvary.¹⁸ Unfortunately, the studies do not fully review the channel usage and conclude erroneously that no channels are available in the reserved band.

The Engineering Statement conclusively shows that at least one channel is available in the reserved band.¹⁹ (No attempt was made to determine the existence of other reserved band channels, of which there may well be several.) Specifically, by siting the station appropriately and using appropriate antenna polarization, a channel 215C3 hypothetical, non-directional, maximum class C3 facility could be constructed to serve Pima, Arizona while meeting NCE

¹⁶ PFR at 3-4 (citing *Second Report and Order* ¶¶ 33,35).

¹⁷ *See generally id.*, Exhibit 1.

¹⁸ *See generally id.*

¹⁹ Engineering Statement at 3-4.

allocations and TV Channel 6 protection requirements.²⁰ Further, assuming NCE AM stations are disregarded – which is the only basis on which the preclusion analysis need be undertaken in the first place – this alternative site would satisfy the first and/or second NCE radio service criterion as well. Given the possibility of constructing and operating such a facility, Calvary’s suggestion that it is technically precluded from constructing an appropriate NCE reserved band facility for Pima is simply incorrect. Thus, because the relevant requirements concerning technical preclusion are not satisfied, the Commission should not modify the FM Table of Allotments as Calvary proposes.

The Public Interest Counsels Against Calvary’s Proposal

The PFR stated that granting Calvary’s proposal would serve the public interest by “substantially further[ing] the fair, efficient and equitable distribution of service by helping to bring a new NCE FM station to the Pima, Arizona community.”²¹ This simplistic analysis ignores the existence of other alternatives that would better serve the public interest. Indeed, the use of channel 215C3 in the reserved NCE band as described in the Engineering Statement, or the construction and operation of any other alternative, compliant facility within the reserved NCE FM band, would ultimately better serve the public interest by permitting the development in Pima of both a first local NCE aural facility *and* a first local commercial aural facility on

²⁰ *Id.* at 3-4, Figure 2. Calvary’s study of Channel 215 indicates that its use at Pima is precluded by virtue of its being allotted for use at Safford, Arizona – a community located 10 miles east southeast of Pima. *See generally* PFR, Exhibit 1. This is an erroneous conclusion. The “allotment” to Safford is an artifact of the agreement between Mexico and the United States for use of channels in the FM band. It is a “placeholder” only, and can be ignored for purposes of channel assignments in the US. As the Commission is well aware, there are no “allotments” of channels in the reserved band. In any event, Figure 2 of the Engineering Statement demonstrates that the proposed site would serve both Pima and Safford.

²¹ PFR at 4.

Channel 296A.²² Thus, in the interest of serving the public interest, the Commission should refrain from amending the FM Table of allotments in the manner that Calvary suggests.

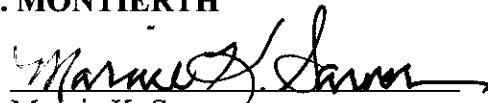
Conclusion

Montierth respectfully requests that the Commission not modify the Table of Allotments for FM Broadcast Stations to reserve FM channel 296A for noncommercial use at Pima. Calvary's proposal fails to satisfy either the first and/or second NCE radio service criterion or the preclusion criterion. *Both* of these criteria *must* be satisfied in order for Calvary's proposed modification to the Table of Allotments to be proper. Further, the public interest counsels against Calvary's proposal and in favor of alternatives that would enable Pima to have both a non-commercial and a commercial first local aural service.

Respectfully submitted,

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May 17, 2004

²² Engineering Statement at 1-2, 4.

CERTIFICATE OF SERVICE

I, Lisa Henry, a secretary in the firm of Wiley, Rein & Fielding LLP, hereby certify that on this 17th day of May, 2004, I caused a copy of the foregoing **Comments** to be mailed via first-class postage prepaid mail to the following:

David A. O'Connor
c/o Calvary Chapel of Tucson
Holland & Knight LLP
2099 Pennsylvania Ave., NW, Suite 100
Washington, DC 20006



Engineering Statement
Rebuttal to Proposed NCE Use of Ch. 296A at Pima, Arizona
MB Docket 04-82, RM-10877
prepared for
R.A. Montierth Enterprises, L.L.C.
Ch. 296A Pima, Arizona

Introduction

R.A. Montierth ("Montierth") was the proponent of a rulemaking to add Ch. 296A at Pima, Arizona. By **Report and Order** DA-98-933 in MM Docket 97-228 (RM-9163) released May 22, 1998, the FCC allotted Ch. 296A to Pima, Arizona as a first local aural transmission service. Subsequently, by **Public Notice** of September 30, 2003, the Commission has opted to offer up many commercial allotments that were on hold for commercial windows/auctions to petitions for their use as Noncommercial Educational ("NCE") stations. In response to the Commission's Public Notice, *Calvary Chapel of Tucson* ("*Calvary*") has claimed that Pima, AZ is an area unserved by noncommercial educational facilities and that the reserved, non-commercial portion of the FM band is unsuitable for use.

Montierth is a resident of the Pima, Arizona area and is well acquainted with the level of NCE and commercial radio service or lack of it. The instant engineering statement has been prepared on behalf of *Montierth* in support of the use of Ch. 296A as allotted by the FCC for commercial use and as proposed by *Montierth*. The instant engineering materials demonstrate how a 1 mV/m contour from A Ch. 296A facility at the Pima, Arizona reference point is encompassed by the 0.5 mV/m contour of one NCE AM facility, substantially covered by the 0.5 mV/m contour of another NCE AM station, and partially covered by the 1 mV/m contour of one (1) NCE FM station.¹ The instant engineering materials also demonstrate how an FM channel in the reserved, non-commercial educational portion of the FM band is suitable for use as a Class C3 station to serve Pima, AZ with no interference to the two (2) nearby Channel 6 TV stations.

Montierth objects to the use of the Ch. 296A allotment at Pima, Arizona as a non-commercial educational allotment when the area is not as unserved or underserved as claimed by *Calvary* and when a viable, higher powered facility might be had by *Calvary* to also serve Pima while remaining within the reserved, non-commercial education portion of the FM band. Use of the NCE portion of the FM band by

¹ Another NCE FM station, KCOO(FM), has been granted a Construction Permit which will result in an additional partial service to the Pima area. Pursuant to Commission policy, the CP is not considered herein.

Engineering Statement
Rebuttal to Proposed NCE Use of Ch. 296A at Pima, Arizona
(page 2 of 4)

Calvary in the instant circumstance would enable the community of Pima, AZ to eventually have both a non-commercial and a commercial first local aural service.

Ch. 296A at Pima, Arizona

Pursuant to a petition for rulemaking filed by a local resident of the Pima area (*Montierth*), Ch. 296A is allotted to Pima, Arizona as a first local aural commercial service. The reference point coordinates for the allotment involve no site restriction and are 32° 53' 36" North Latitude, 109° 49' 42" West Longitude. Within a 1.0 mV/m contour from a maximum Class A facility at the allotment reference coordinates are 29,487 people. Within a 28 km radius circle (Class A Class Contour distance) from the proposed reference site are 27,552 people, based on SF1 block level data from the 2000 U.S. Census.

Other NCE Services Within Pima Service Area

Figure 1 is a map depicting the 1.0 mV/m contour that would result from a maximum class, Class A facility on Ch. 296A at the Pima Reference coordinates along with a 28.3 km radius circle (Class A Class contour distance). Included on **Figure 1** are the service contours of all identifiable NCE service stations found to reach the Pima, AZ area. As shown therein, the 0.5 mV/m service contour of KFLT(AM) encompasses all of the Ch. 296A Pima service area regardless of whether a 1 mV/m contour or class circle are considered. The 0.5 mV/m service contour of KUAZ(AM) encompasses 26,828 of the 29,487 people encompassed by the Ch. 296A 1.0 mV/m contour or 25,006 of the 27,552 people encompassed by the 28.3 km class circle. The 1.0 mV/m contour of KUAT-FM encompasses 52 of the 29,487 people encompassed by the Ch. 296A 1.0 mV/m contour or 52 of the 27,552 people encompassed by the 28.3 km class circle.

Based on the foregoing information shown with **Figure 1**, it is apparent that there is no area within the Ch. 296A 1.0 mV/m contour or the 28.3 km class circle which might be considered "unserved." Further, only 2,659 or 9% of the 29,487 people encompassed by the Ch. 296A 1.0 mV/m contour or 2,546 or 9.2% of the 27,552 people encompassed by the 28.3 km class circle would benefit from Ch. 296A as an NCE "second" aural service. While that may meet the Commission's 2,000 person threshold it does not meet the 10% threshold. It is also far from the first aural NCE service benefit *Calvary* claims it would provide to Pima.

Engineering Statement
Rebuttal to Proposed NCE Use of Ch. 296A at Pima, Arizona
(page 3 of 4)

Hypothetical Ch. 215C3 facility for Pima, Arizona

Attached as **Figure 2** is a map depicting a Ch. 215C3 hypothetical, non-directional, maximum class C3 facility that would serve Pima, Arizona while meeting NCE allocations and TV6 protection requirements. The hypothetical Ch. 215C3 facility would be situated on a mountain ridge overlooking Pima at the coordinates 33° 01' 00" North Latitude, 109° 39' 45" West Longitude. A radiation center of 1792 m AMSL, 30 m AGL, and 377 m AAT is used. The HAAT of 377 meters for a maximum class C3 facility (25 kW/100m AAT) warrants a cutback, equivalent ERP of 1.65 kW. This hypothetical facility's 70 dBμ contour would encompass, Pima, AZ, and 22,989 people. The hypothetical 60 dBμ contour would encompass 28,666 people. This is comparable to the potential coverage of the Ch. 296A facility as calculated for the allotted reference point.

Assuming that the NCE AM stations were to be discounted leaving only the NCE FM, KUAT-FM, a first service would be provided to virtually all of the population within the hypothetical Ch. 215C3 service area.

TV Channel 6 Protection Considerations

Included on **Figure 2** are the Grade B protected service contours of KUAT-TV (Ch. 6, Tucson, AZ, Facility ID 2731) and KOBG-TV (Ch. 6, Silver City, NM, Facility ID 85114). While the Grade B contour of KUAT-TV overlaps the Pima area, the Grade B contour of KOBG-TV does not come close to the 60 dBμ contour of the hypothetical Ch. 215C3 facility for Pima. Thus, there would be no overlap of pertinent protected and interference contours between the hypothetical Ch. 215C3 facility and KOBG-TV.

In order to meet TV Channel 6 interference protection criteria toward KUAT-TV, a vertical polarization only antenna system was considered. By using vertical polarization only, as permitted pursuant to the Commission's Rules, an ERP of 0.04 kW (1.65/40) would be used to determine the interference area within the KUAT-TV Channel 6 Grade B contour. Within the KUAT-TV interference area that would be calculated for such a hypothetical 0.04 kW facility, and based on 2000 U.S. Census, SF1 Block level data, there is no identifiable population that would be predicted to receive interference based on the FCC's

Engineering Statement
Rebuttal to Proposed NCE Use of Ch. 296A at Pima, Arizona
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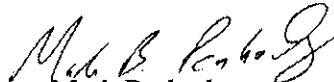
prescribed TV6 protection methodology. Detailed calculations of the determination of the predicted interference area are available to the Commission staff upon request.

Conclusion

Calvary's proposed use of Ch. 296A does not meet the Commission's standards for co-opting a commercial allotment. There is no unserved area that would receive a first NCE service from Ch. 296A at Pima at the allotted reference point. Only a small portion of the population served (9% or 2,659 people at most), would receive a second NCE service with the use of Ch. 296A. There is at least one comparable, hypothetical facility which complies with the Commission's NCE contour protection and TV Channel 6 protection criteria while remaining in the reserved, non-commercial educational portion of the FM band. *Montierth* objects to the "cherry picking" of Ch. 296A by *Calvary* when there is a comparable, alternative channel available in the reserved NCE band. Use of the reserved NCE band as described herein or with any other alternative, compliant facility within the reserved NCE FM band would ultimately better serve Pima and its environs by permitting the development of both a first local NCE aural facility and a first local commercial aural facility.

Certification

The undersigned hereby certifies that the foregoing statement was prepared by him or under his direction, and that it is true and correct to the best of his knowledge and belief. Mr. Peabody is an employee of the firm of *Cavell, Mertz & Davis, Inc.*, and has submitted numerous engineering exhibits to the Federal Communications Commission. His qualifications are a matter of record with that agency.


Mark Peabody
May 17, 2004

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703-392-9090

Attachments

Figure 1 - Other NCE Services in proximity to Pima, Arizona

Figure 2 - Predicted Coverage Contours of Ch. 215C3 Hypothetical NCE station at Pima, Arizona

FIGURE 1
PREDICTED COVERAGE CONTOURS
OF NCE RADIO STATIONS IN PROXIMITY
TO PIMA, ARIZONA

prepared May 2004 for
R.A. Montierth Enterprises, L.L.C.

Carroll, Morris & Davis, Inc.
Missoula, Virginia

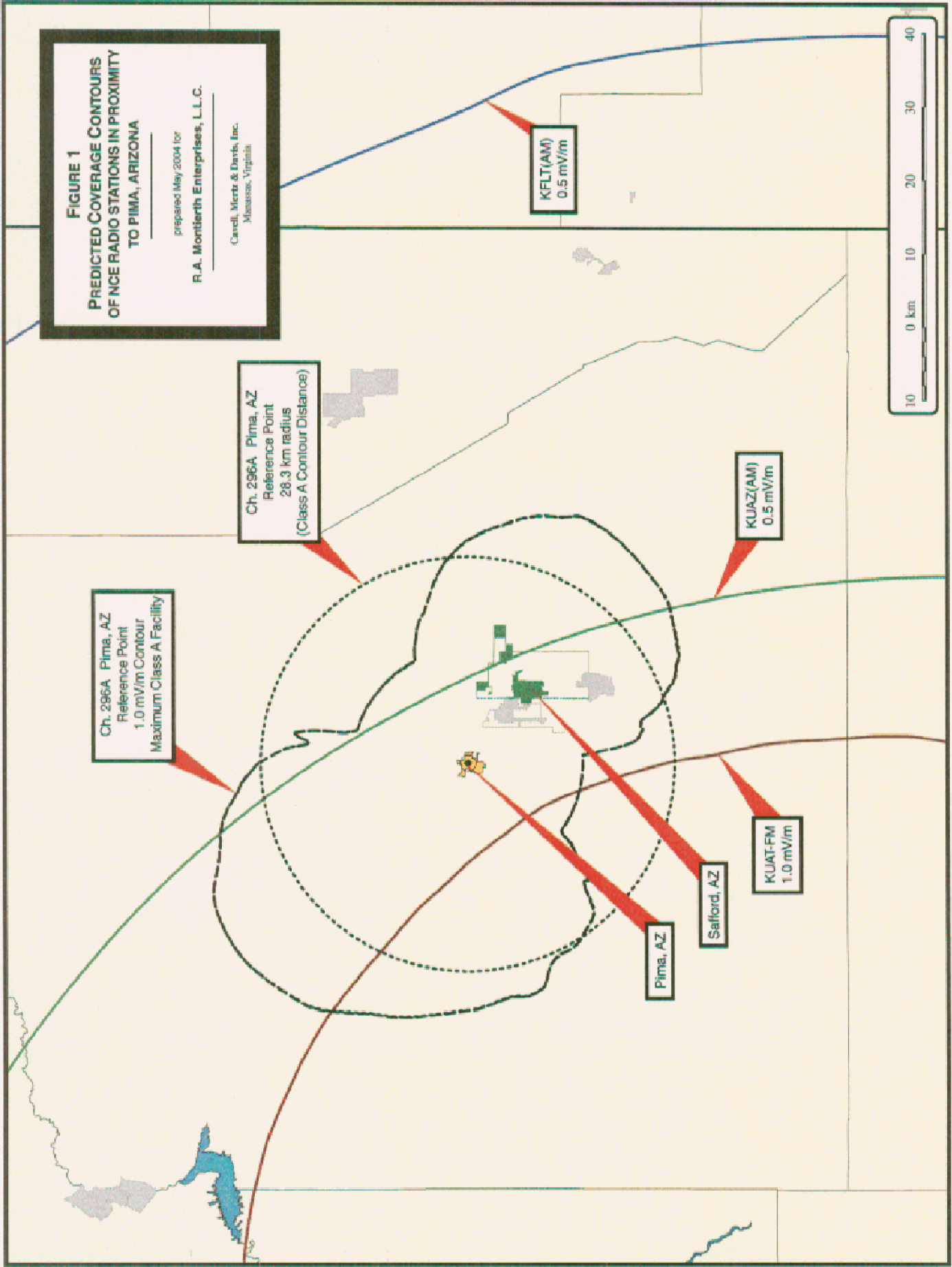


FIGURE 2

**PREDICTED COVERAGE CONTOURS
HYPOTHETICAL Ch. 215C3
MAXIMUM CLASS C3 FACILITY
AT PIMA, ARIZONA**

prepared May 2004 for
R.A. Montierth Enterprises, L.L.C.

Cavell, Meritz & Davis, Inc.
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